THE TEST OF CONVERSION.

IS there any definite test of conversion, or must we agree with Baron Bramwell's observation,[1] that "after all no one can undertake to define what a conversion is"?

It needs little argument to show the value of a definite test. The difference in the measure of damages between trover on the one hand and trespass or case on the other is radical and has not been affected by any reform in procedure.

Most of the confusion which has occurred can be traced to two sources: one is the use by courts and text-writers of such equivocal and indefinite phrases as "act of dominion," "exercise of control," etc.; the other is the tendency of the courts to allow trover in cases where the amount of damages would be the same if trespass or case were brought, because of the total loss of the chattel.[2]

Originally the phrase in the declaration in trover, that "the defendant has disposed of the property and converted it to his own use,"[3] meant exactly what it said, *viz.*, that the defendant intended to receive and did receive the full benefit of the chattel, thereby necessarily intending to deprive and depriving the plaintiff permanently of all his rights in it. It is now, of course, wholly unnecessary either that the defendant receive or intend to receive any benefit, the law having developed here as it did in deceit. Nor is it strictly necessary that the plaintiff be entirely deprived of his right in the property; it may be that the defendant would gladly return the chattel in good condition to the plaintiff, but a tender of it will not cure the tort, and in most jurisdictions will not even mitigate damages.[4] Is it still necessary in order to constitute a conversion that the defendant intend to deprive the plaintiff entirely of his rights in it, or has this also become a legal fiction?

It perhaps ought to be remarked before going further that it seems to be well settled that there is no conversion without some physical act of intermeddling with the chattel, such as taking or transferring possession, detention, use, or preventing removal.

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[1] Burroughs *v.* Bayne, 5 H. & N. 296.

[2] Bramwell, B., in Hiort *v.* Bott, L. R. 9 Exch. 86.

[3] Chitty, Pleading, 13 Am. ed., 836.

[4] Sedgwick, Damages, 8 ed., 74.

For example, an auctioneer who merely makes the contract of sale without in any way interfering with the goods themselves is not liable in trover.[1] The troublesome question is, what more is necessary besides such physical interference? Must there be coupled with it the intent to deprive the plaintiff permanently of his rights in the chattel, or is something less sufficient?

In the vast majority of cases where trover has been allowed, this element of intent has been present. In all the cases where there has been a purported dealing with the title upon the assumption that the plaintiff has no right in the chattel, the defendant necessarily intends the natural consequences of his act, *viz.*, the entire deprivation of the plaintiff. If A, either for himself or for another, purports to sell or mortgage or pledge X's property to B, both A and B acting upon the assumption that the property is A's, the intent to deprive X permanently of his rights in the chattel is necessarily implied. Perhaps neither A nor B would have intended to deprive X of his property right if they had known of its existence, but mistake of title, even in good faith, is no excuse. So, where there has been an actual dealing with title, the defendant being a fraudulent vendee, or purchaser with notice from a fraudulent vendee; or where the defendant has intentionally destroyed or made an essential change in the nature or quality of the chattel; or where the defendant has levied judicial process upon the property; or where he has used or detained it after demand, denying that the plaintiff has any right to it, the intent to deprive permanently is apparent.

In all these cases it seems fair and in accord with common law principles for the plaintiff to be able to say to the defendant: "You have wrongfully intermeddled with my chattel intending to deprive me of my rights in it." If, however, there is no such intent, express or implied, is it just to compel the defendant to buy the chattel at a price to be fixed by a jury?

Trover has been generally allowed for misfeasances by a bailee, without any reference to this element of intent. One typical case is that of a bailee of a slave using the slave for a different purpose from that for which he was hired. Another is that of a bailee of a horse driving it beyond the place to which he was hired to go. It is significant that in most of these cases of misfeasance by a bailee, the property was accidentally destroyed during such wrong-

[1] Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495 (*semble*). See also Traylor *v.* Horrall, 4 Blackf. (Ind.) 317.

ful use or became a total loss later as the result of such use; hence, if the plaintiff had sued in case he would have recovered the same amount of damages, the law throwing upon the intermeddler the risk of accidental loss during such unlawful possession. In Farkas *v.* Powell,[1] where the question arose squarely, the court held that if the accident to the horse happened after the bailee was again acting within the terms of the bailment, he was not liable unless the extra drive caused the loss of the horse; that is, although the courts call it a conversion, the defendant seems to be held liable only when he would be liable if case were brought.

If we regard these "driving beyond" cases as conversion, at what time does the defendant become a converter? How far beyond must he drive — a mile, a rod, or a foot? If the bailee had no right to use the horse at all, any use by the bailee would be some evidence of the defendant's intention to deprive the plaintiff permanently of his rights; this would be still stronger if the defendant knew that the horse was unfit for use and that the plaintiff had expressly forbidden any use. But in the "driving beyond" cases the property is usually kept by the plaintiff for the purpose of hire, and it would seem that he is adequately protected by the law if he is given the value of the extra use and the defendant is held liable as insurer during such wrongful use. If merely driving beyond is really a conversion, then, whether anything happened to the animal or not, the plaintiff could compel the defendant to buy the horse. It would certainly startle most liverymen if they were told that any deviation by one who hired a rig gave the former a right to make the latter purchase the property; and yet this is the inevitable conclusion from calling it a conversion.

Though courts have often said that any wrongful use of a chattel is a conversion, the case of Frome *v.* Dennis[2] is inconsistent with this idea and right. There the defendant used a plow three days thinking that the man from whom he borrowed it was the owner, and returned it to him in good faith at the end of that time. He was held not liable in trover, though if there had been any purported dealing with title, his mistake as to ownership would not have excused him; nor would he have been excused thereby if the plaintiff had sued him in quasi-contract for the value of the wrongful use, or in case for the value of the chattel if it had been

[1] 86 Ga. 800.

[2] 45 N. J. L. 515.

accidentally destroyed during the three days. Of course, if the chattel were such that use would consume it or essentially alter it, there would be conversion by intentional destruction; such a case presents no difficulty.

If a bailee instead of wrongfully using the chattel attempts to return it to the bailor without authorization, the law properly throws upon him the risk of transportation. Trover has been allowed in these cases, but here, as in the "driving beyond" cases, an action on the case would usually bring about the same result, since in most of the cases the chattel has been entirely lost. It seems odd to call the defendant a converter here where, instead of intending to deprive the plaintiff of any right at all, he is attempting to restore the possession of the property to him.

Carriers and warehousemen have been held liable in trover for a mere misdelivery. These cases have been criticized, however, and Martin, B., said in Crouch *v.* Great Northern Ry. Co.:[1] "If the question of an action of trover against a carrier for misdelivery were to be considered now for the first time, the courts would probably hold that trover was not maintainable."

In the case of England *v.* Cowley,[2] where the defendant wrongfully refused to allow the plaintiff to remove goods out of a house during one night so that he might distrain the next day, leaving the plaintiff in the house in possession of the goods, it could hardly be denied that there was an exercise of dominion as the phrase is generally understood. But the majority of the court held that the defendant was not liable in trover, Bramwell, B., saying: "the truth is that in order to maintain trover a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by plaintiff, he must say that nothing shall." It is difficult to see why the last sentence should be limited to cases where the plaintiff has been left in possession of the goods; being left in possession of goods in a guarded house is certainly not of so much importance as to require a different rule. In some cases trover has been allowed for wrongfully refusing to allow removal, and in many of them no doubt the intent to deprive the plaintiff of all his rights in the property probably existed and would have been found as a fact if submitted to

[1] 11 Exch. 742, 757.

[2] L. R. 8 Exch. 126.

a jury; but unfortunately the courts in their instructions to the jury have generally failed to direct such an inquiry.

In the comparatively recent case of Hollins *v.* Fowler[1] Lord Blackburn's dictum considerably qualified the act of dominion test. In that case he says: "It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification." He then lays down the following qualification: "On principle one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession if he was a finder of the goods or intrusted with their custody." The result reached by such a rule is to be commended. But it may be pointed out that in the first place it is incomplete, as Lord Blackburn confesses in the next paragraph: "I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties." It is also to be observed that Lord Blackburn uses the word "excuse"; though he probably did not consider such cases as conversion at all, the language is liable to be considered as meaning excusable conversion. This is important on the question of the burden of proof. The phrase "should be excused for what he does" does not apply, of course, to an action on the case. The elaborate rule seems a cumbersome way of dealing with the question and brings about an unfortunate distinction between cases where mistake of title is and is not a good defense to a tortfeasor.

As long as all the cases in which trover has been allowed are considered as real conversions, it would seem to be impossible to frame any satisfactory definition. Many of the attempted definitions in the decisions and text-books give one almost no help. Cooley[2] defines conversion as "any distinct act of dominion wrongfully exerted over another's property in denial of his right or inconsistent with it." This phrase "act of dominion," which appears so

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[1] L. R. 7 H. L. 757 (1875).

[2] Cooley, Torts, 3 ed., 859. For a similar definition, see 28 Am. & Eng. Encyc., 2 ed., 679. For some other definitions, see Bishop, Non-Contract Law, § 403 ("any dealing with a chattel which impliedly or by its terms excludes the dominion of the owner"). Pollock, Torts, 288 ("an unauthorized act of dominion which deprives another of his property permanently or for an indefinite time").

often in the cases and text-books, probably meant at one time something more than a mere intermeddling; but no one, apparently, has been able to tell exactly what that something was, and hence the phrase has come to mean nothing more than it necessarily means — an act of intermeddling or interference. The phrase "inconsistent with his right" adds nothing in the way of definition, because any trespass or other act of intermeddling is inconsistent with the right of the owner, otherwise it would not be a tort at all; but it seems to be well settled that a mere trespass is not a conversion.[1] The phrase "in denial of his right" is equivocal; does it mean "in denial of all the plaintiff's rights" or "in denial of one or some of the plaintiff's rights"? Whichever it was intended to mean, the alternative phrase "inconsistent with plaintiff's right" makes it impossible to say that the definition really defines anything more than an intentional trespass or other act of intermeddling.

Clerk and Lindsell[2] say that a conversion takes place "when a person entitled to the possession of a chattel is permanently deprived of that possession." The defect in this definition is that, as has been pointed out in the first part of this article, actual deprivation is not strictly necessary, because the defendant may be willing to restore the chattel, especially in cases where he has acted in good faith. The defect would seem to be all the more serious as a statement of English law, because the defendant has under some circumstances in England the right to return the chattel in mitigation of damages,[3] though not by way of curing the tort. It would seem also that a definition ought to convey the meaning that the defendant must act intentionally, since trover does not lie for a negligent act.

Bigelow[4] has defined conversion as "an act of dominion over the movables of another; that is, a usurpation of ownership." This seems less objectionable than the others, if he means by "usurpation of ownership," complete ownership. The difficulty is that it apparently does not cover those cases where the defendant has no intent to receive any benefit; for example, where the defendant knowingly assists in the purported transfer of title from one party to another.

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[1] Fouldes *v.* Willoughby, 8 M. & W. 540.
[2] Clerk & Lindsell, Torts, 3 ed., 218.
[3] Fisher *v.* Price, 3 Burr. 1363.
[4] Bigelow, Torts, 8 ed., 395.

In a criticism in this REVIEW[1] of Doolittle *v.* Shaw,[2] in which case it was held that a mere driving beyond was not a conversion, the following definition was laid down: "an interference with plaintiff's possession or right to it, amounting to a complete denial for an appreciable time." Apparently this means an act of intermeddling which deprives the plaintiff of his possession or right to it for some time longer than a mere moment. No attempt is made to state how much longer. Surely such a serious liability as that of the defendant in trover ought not to depend upon such an uncertain test. No proper analogy can be drawn between interference for an appreciable time and the doctrine of substantial performance in contracts, because the latter phrase means almost a full performance; that is, there is a limit upward.

Upon principle it would seem that in order to constitute a conversion there ought to be coupled with the act of intermeddling the intent to deprive the plaintiff permanently of all his rights in the chattel — an element which was present in the early history of the action. Except in those cases where this element of intent is obvious, as, for instance, in cases of purported dealing with title where it is necessarily implied, the question should be submitted to a jury just as any other doubtful question of issuable fact.

There is one class of cases which may occur to the learned reader as presenting difficulties under this proposed test. Suppose the defendant detains the chattel claiming only a limited interest in it, as, for example, that by agreement with the plaintiff he has a right to use it for a month, or that he has a lien on it, acknowledging otherwise the plaintiff's rights in the property. In the first place it is to be observed that unless the claim be made in good faith it would not necessarily negative the finding of the suggested element of intent. Intent here, as in other parts of the law, means the probable intent as gathered from all the circumstances. If, however, the claim be made in good faith, it would seem that the plaintiff is adequately protected by his action on the bailment, of replevin, or of case for intermeddling — the risk of loss devolving upon him even though he should be making the claim in good faith. It may also be pointed out that since even at common law a count in case and one in trover could be joined, the plaintiff, if he failed to prove the element of intent in the proposed test, could still recover in case and would not be thrown out of court. In

[1] 8 HARV. L. REV. 280.

[2] 192 Ia. 348.

those jurisdictions which have a more liberal rule as to joinder, or which have abolished the distinction between forms of action, the plaintiff would be at least equally if not better protected against such a contingency.

Though the plaintiff need only show, as establishing his right to sue, actual possession as bailee, finder, or trespasser, or right to immediate possession, he generally has the complete ownership of the property, which consists, as has been observed, of a bundle of rights. Can a logical line be drawn at any point between an intent to deprive of one of these rights and an intent to deprive of all the rights which the plaintiff may have? It would seem that it is no more possible than to draw a logical line at any point between intent to deprive permanently and intent to deprive for an instant of time.

The rule laid down by Lord Blackburn in Hollins *v.* Fowler seems to have been generally approved. Would it not be possible to take the further step of eliminating from the law of conversion the rest of the cases where there is no intent to deprive the plaintiff permanently of his rights? If the names trover and conversion are too firmly attached to these cases to be shaken loose by judicial decision, would it not be better to consider such cases as exceptions, not to be taken into account in defining conversion? If this step could be taken it would make the law of conversion logical, simple, and just.

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